

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6194

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

WATERMAN STEAMSHIP CORPORATION,

Plaintiff-Appellant,

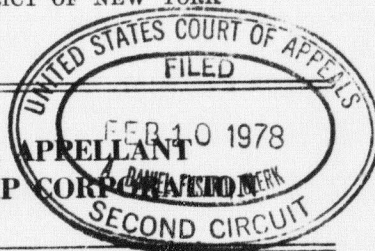
—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT
WATERMAN STEAMSHIP CORPORATION



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1. Defendant cites (Br. 14) but does not rely upon the opinion of the district court. It appears to be common ground that the opinion below is innocent of a viable rationale.

2. Defendant exceeds the bounds of advocacy and strays into obfuscation when it substitutes, willy-nilly, one contract term for another. Thus, with the skill of an alchemist, defendant transmutes "rates" into "charges" and "charges" into "rates". Those terms are not, however, used interchangeably in the agreement.

Defendant mischaracterizes the minimum "charge" for exclusive barge use in Article 1(E) as a product of FIO "charges" (Br. 19-20) although the contract expressly pro-

vides for the computation to be based on FIO "*rates*" (15a-16a, 20a).

Defendant likewise misdescribes the compensation fixed by Article 12(C) as offloading "*rates*" (Br. 19-22), notwithstanding the undeniable contract provision for offloading "*charges*" in both Article 12(C) and its associated table (16a-17a, 18a, 21a).

3. Defendant suggests (Br. 22) that there is some significance in the omission of any express reference to offloading charges in Article 1(E). Plaintiff agrees. Offloading charges are consistently described throughout Articles 9, 12(C), 13, and the tables of the agreement as an increase in, and part of, the freight "*rate*" (16a-19a, 21a). If the parties intended to give the term "*rate*" in Article 1(E) a different meaning, they surely would have said so.

4. Defendant protests (Br. 21-22) that, in the context of this case and "by no stretch of the imagination", could the term "*rate*" in Article 1(E) be the equivalent of more than \$69.74 or \$85.14, as set forth in the table of basic ocean freight rates (19a). The argument is untenable in the face of defendant's acknowledgment (Br. 23) that the "*rate*" specified in Article 1(E) was subject to increase by the Suez Canal surcharge. Moreover, Article 1(E) does not expressly refer to the Suez Canal surcharge. If defendant understood the term "*rate*" in Article 1(E) to include an increase for the canal surcharge, but to exclude an increase for offloading charges, it manifestly did not indicate that when it drafted the contract.

5. Defendant's speculations (Br. 24) about its own motives, for expressly providing that the Suez Canal sur-

charge would apply to the offloading charges, are without any support in the record as well as self-serving and irrelevant. There is no ambiguity about the Suez Canal surcharge. The contract simply provides for increased payments of offloading charges if the ship proceeds via the Cape of Good Hope. The principle is perfectly consistent with a provision for increased payments of offloading charges if defendant fails to provide a full cargo.

6. Defendant's allegations of a "windfall" (Br. 24-27) are bombast. A windfall is the equivalent of "excessive profits", and there is no evidence that plaintiff made any profit at all on these voyages during a time of high bunker prices and depressed market rates. If plaintiff recovers on this appeal, and defendant truly believes that plaintiff thereby received excessive profits, the appropriate remedy would be to proceed under the Renegotiation Act. 50 U.S.C. App. §§1211 et seq.

It may also be noted that several of defendant's mathematical computations, in support of its spurious allegations of windfall, are grossly misleading. Thus, defendant's theoretical example of a 30 ton cargo (Br. 26) could occur only if defendant itself chose to load such a small quantity and, in fact, defendant loaded an average of 220 tons on the barges actually involved in this matter.¹

Defendant's use of percentages (Br. 27) is also a little sly. By relating the amounts in dispute only to the actual tonnage of the vehicles, defendant is able to produce figures varying from 20% to 84%. On the other hand, if the amounts of ocean freight in dispute are calculated with

¹ The addendum to defendant's brief indicates 112 barges carried a total of 24,635 measurement tons or an average of 220 tons per barge.

reference to the ocean freights already paid, the differences turn out to be just 1.31% to 3.69%.²

CONCLUSION

For the foregoing reasons, as well as those set forth in appellant's main brief, the decision of the district court should be REVERSED and judgment entered in plaintiff's favor.

Dated: New York, New York
February 10, 1978

Respectfully submitted,

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² Under the original wording of Article 1(E), which applied to all voyages in 1974, the minimum charge for exclusive barge use was calculated from the NOS rate which was \$85.14 (16a, 19a). The applicable offloading charge for 1974 voyages was \$9.15 (18a).

Under the amendment to Article 1(E), which applied to voyages in 1975, the minimum charge for exclusive barge use was calculated from the lowest commodity rate which, as amended, was \$103.54. The offloading charge for 1975 voyages was \$10.25 (21a).

Defendant indicates (Br. 27) that the widest disparity between offloading charges occurred in connection with the 7th voyage of the ANDREW JACKSON in 1975 on which seven Mobile barges discharged at Kuwait and one New Orleans barge discharged at Jeddah (Br. 2b). Using 2100 metric tons and 300 metric tons, respectively, and applying an FIO rate of \$103.54, an offloading charge of \$10.25, and a Suez Canal surcharge produces total ocean freights of \$298,698.75 and \$42,671.25, respectively, in connection with those barges. There is no dispute that the Military Sealift Command paid all of the ocean freight charges in connection with those barges (Br. 10) except for \$3,864.89 and \$1,549.62, respectively (Br. 2b), which disputed ocean freights constitute only 1.31% and 3.69%, respectively, of the total ocean freights already paid.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK

} s.s.:

Ramon I. Constantino, being duly sworn, deposes and says that he is a clerk in the office of Burlingham Underwood & Lord, *Attorney* for *Plaintiff - Appellant Waterman Steamship Corporation* herein; that on the *10th* day of *February*, 19*78*, he served the within *Reply Brief* by mailing ^{*2*} ~~X~~ true copy thereof, securely enclosed in a postpaid wrapper, in the post-office box regularly maintained by the United States Government at One Battery Park Plaza in said County of New York, to each of the following:

Mr. Michael Kimball
Civil Division Appellate Section
Department of Justice
Washington, D.C. 20530

The address of each of the above is the address designated by each of them for that purpose upon preceding papers in this action, or the place where each then kept an office.

Sworn to before me this *10th*
day of *February*, 19*78*.

James P. Sawicz

JAMES P. SAWICZ
Notary Public, State of New York
No. 41-4636061
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1978

Ramon I. Constantino